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THE UNIVERSITY OF ALBERTA

LIBERTARIANISM AND THE CONSIDERATION OF CHILDREN

by

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A THESIS
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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled LIBERTARIANISM AND THE CONSIDERATION OF CHILDREN, submitted by David J. Wilson in partial fulfilment of the requirements for the degree of Master of Arts.

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ABSTRACT

Robert Nozick defends a position popularly known as libertarianism. Nozick's position presents man as an atomistic individual, who is capable of wielding his rights and surviving more or less efficiently. I intend to discuss some serious moral problems that arise within Nozick's position as he states it. The assumption Nozick makes about the individual are unacceptable as a moral foundation. I argue that the conclusions Nozick's arguments yield only appear morally acceptable if we assume all parties concerned are rational, stable adults. This assumption is not only false, but yields morally unacceptable conclusions when other factors are considered. A moral (or political) theory that ignores the sorts of problems I intend to raise is unacceptable. I will focus upon the problems Nozick's theory encounters when children are considered. This consideration presses for major changes in both the premises and conclusions of Nozick's argument.

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INTRODUCTION AND GENERAL REVIEW

In Anarchy, State and Utopia[1], Robert Nozick claims that each individual has certain rights which must not be violated. The most basic of these rights protect individual freedom, and thus only minimal intervention into individuals' affairs will be justifiable. Beginning with the notion of individuals as "atomistic" (i.e. by nature independent of each other) Nozick claims that the individual has a right to liberty. This implies, for instance, that the individual should be free from redistributive taxation schemes. Nozick's final claim is that individual freedom, when left unobstructed, results in the possibility of meaningful lives. Extensive interference of the state is immoral since it violates the individual's right to freedom, thus hindering the individual in pursuing a life of the sort he may choose to live. The only outstanding obligation on the part of any individual is a negative one. The individual must not violate the rights of others. He must, for instance, honour his contracts; defaulting on contracts would be to violate the rights of the individuals with whom the contract was made.

Some moral positions may involve the violation of rights in obtaining a specified goal. Nozick rejects these positions. His position is one that focuses on the individual as inviolable; he has very strong natural rights. To secure a prominent position for rights Nozick adopts a "side constraint" moral theory. Each individual has negatively defined (Lockean) rights. These make up the side constraints on the actions of other individuals. Most basic among these is a right to noninterference. Any individual has the right not to be interfered with in pursuing his life plan--provided he abides by the side-constraints imposed upon him by the rights of others.

I intend to discuss the moral theory that underlies Nozick's position on freedom. I will show why this theory is not sufficient to support his further claims. Nozick produces only the rough framework of this moral base.[2] However, the sketch he does give only lends plausibility to his position by making several questionable assumptions con-

cerning human existence. I shall draw attention to some of these. When these assumptions are challenged, certain latent incoherences in Nozick's position become manifest. This is what I intend to show.

Two key concepts are used by Nozick to derive and justify the minimal state. They are: compensation and punishment. In accepting a Lockean state of nature, Nozick claims the individual has certain "natural rights". Although he does not spell out a complete set of these, Nozick does advance a right to compensation and a right to punish as examples of this basic franchise. These are rights in the strongest sense.

Why does Nozick claim individuals have natural rights? Although he does not undertake a sustained discussion of this matter, Nozick does appeal to certain basic ideas he thinks justify this position. Nozick takes very seriously "...the fact of our separate existences".[3] This root idea finds expression in four basic claims. They are:

1. No individual can be sacrificed for the benefit of any other individual.[4]
2. The (underlying Kantian) principle that each person must be treated as an end and never merely as a means.[5]
3. No individual is a resource for any other individual.[6]
4. Each individual is responsible for choosing his life plan.[7]

As Nozick states, his book "does not present a precise theory of the moral basis of individual rights".[8] Nor does he show that these are the correct basic ideas for a moral theory. However, Nozick assumes that they are correct, and then goes on to argue for very strong libertarian conclusions.

The crux of Nozick's position is his side-constraint morality. The four points I have listed above, Nozick claims, lead to a side-constraint view. More specifically, he argues that acceptance of this basic moral form necessarily leads to a libertarian content.[9] According to Nozick, the scope of political philosophy is concerned only with certain ways people interact.[10] It is primarily concerned with acts of aggression. Side constraints are designed to delineate the realm of permissible, aggressive acts. Nozick states:

> A specific side constraint upon acts towards others expresses the fact that others may not be used in the specific ways the side constraints exclude. Side constraints express the inviolability of others, in the ways they specify. These modes of inviolability are expressed by the following injunction: "Don't use people in the specified ways".[11]

Side constraints 1) are a strong statement of individuality and 2) determine the only morally justified ways we may treat a fellow individual. These are the basic premises in Nozick's arguments.

But what sort of individual is it who lives within Nozick's bare market system? Nozick's position seems reasonable and appealing, because he assumes a mature rational man, who is capable of wielding his rights and surviving more or less efficiently. However, this assumption is far from being accurate. One of the fundamental facts of human existence is that each of us begins as a child. This early stage requires direct, active support.

Nozick argues in such a manner that individuals ought only to be protected from acts of commission. He thus adopts a set of (roughly) Lockean rights.[12] This is perhaps a reasonable assumption for a fully rational adult community. But it is not reasonable to assume the same set of rights is given to everyone--including children. This oversight on Nozick's part reflects a very naive concept of man. Given the consequences of acts of omission in the child's case, a set of negative rights hardly protects this child.

In his fight to protect liberty, Nozick has ignored the preconditions for it. One of these preconditions is existence. Human existence is quite complex. In the first stages of our lives we are dependent upon the acts of others. Usually childhood years are spent as dependents of our parents. Simple respect for our negative right to non-interference would be disasterous. Left alone a child starves. This is a simple fact about the human situation.

I intend to discuss some serious moral problems that arise within Nozick's position as he states it. The assumptions Nozick makes about the individual are unacceptable as a moral foundation. I argue that the conclusions Nozick's arguments yield only appear morally ac-

ceptable if we assume that all parties concerned are rational, stable adults. This assumption is not only false, but yields morally unacceptable conclusions when other factors are considered. A moral (or political) theory that ignores the sorts of problems I intend to raise is unacceptable. I will focus upon the problems Nozick's theory encounters when children are considered. This consideration presses for major changes in both the premises and conclusions of Nozick's argument.

A further assumption, when exposed, supports my position. Nozick implicitly relies on the assumption of an extended family. This assumption involves a family unit that will meet all the obligations to the children, the aged, the handicapped and so forth. However, in our mass society, the extended family has virtually disappeared. Given modern trends, it appears that even the nuclear family is becoming a dinosaur. The problem of care for those unable to care for themselves is increasing at a rapid pace.

In the first chapter, I examine what meaning can be assigned to the type of liberty Nozick defends. I claim his manner of defense drains the meaning from the item defended. Knowledge is a precondition for liberty. If certain (minimal) standards of knowledge are not present, the concept of liberty becomes valueless. Children have a right to the required knowledge. It is only by recognizing this right that Nozick's discussion of liberty can be made plausible. However, this is a positive right; it is a right <u>to</u> an education. This fact, combined with the development stages a child goes through, requires that a more extensive state administer an educational program.

The second chapter will discuss Nozick's derivation of the minimal state. Starting with a Lockean state of nature, Nozick attempts to show that only a minimal state is justifiable. He claims that individual liberty is such that no more than this amount of state action is allowable. The prime components in his justification of the state are the rights to compensation and punishment. Nozick presents these as rights in the strongest sense. However, I argue that consideration of innocent third parties (e.g. children) requires that Nozick's position be altered.

The next chapter is concerned with how Nozick's theory handles "moral horrors". Although he lacks any argument for the absolute status of side constraints, he continually treats these constraints as though they are in fact absolute. If this is the position Nozick wants to defend, then he will be unable to avoid human tragedies that are morally unthinkable. Basic moral intuition demands that these moral problems be adequately dealt with. The types of problems I discuss, require a more extensive state than Nozick's theory allows.

The concluding section of Nozick's book is entitled "A Framework for Utopia". Nozick claims that his discussion of utopia is independent of his arguments concerning the minimal state. Although independent, it is not totally separate from the issues of concern in the previous sections. Nozick identifies the "framework" of utopia as being the minimal state. Thus the problems discussed in relation to the minimal state can be expected to crop up again in the discussion of utopia. I argue below that these problems dramatically alter Nozick's description of utopia.

According to Nozick, independent arguments allow the minimal state and utopia to be understood as separate discussions. It is their corresponding character (i.e. the minimal state as the framework) that draws the two threads together. Nozick claims:

> The framework for utopia that we have described is equivalent to the minimal state. The argument of this chapter starts (and stands) independently of the arguments of Parts I and II and converges to their result, the minimal state, from another direction.[13]

I think Nozick's utopia faces problems in itself, and problems that are shared with the minimal state. As the above passage notes, the minimal state is the framework, thus the framework is as minimal as the state. However, the minimal authority held by the state may not insure that an individual is free from all restrictions. Each community will have its own character and set of restrictions. Nozick states:

> ...this is merely another way of pointing out that in a free society people may contract into various restrictions which the government may not legitimately

> impose upon them. Though the framework is libertarian and laissez-faire, individual communities within it may not be, and perhaps no community within it will choose to be so. Thus, the characteristics of the framework need not pervade the individual communities.[14] (Nozick's emphasis)

However, I shall argue that the minimal state must be both more extensive and redistributive. Thus, this is true of the framework. Nozick claims that this superstructure need not greatly influence the nature of the community. However, I argue that the framework must in fact have a great deal of influence and control over each community. It will determine the basic substructure of each.

Perhaps the biggest alteration in utopia comes to light when intercommunity aid is considered. Is a community responsible for the destitute in another community? Or, is the responsibility for the destitute confined to the community itself? Nozick's general discussion of utopia leaves the impression that the communities will have little to do with each other. He says little about the possibility of intercommunity obligation beyond his consideration of natural rights. Nozick does claim, "A nation or protective agency may not compel redistribution between one community and another...."[15] I thus assume that intercommunity obligation is restricted to the realm of natural rights. I think Nozick is wrong.

In his criticism of Rawls, Nozick says something about how micro examples apply to macro cases. Nozick claims:

> ...one should not depend upon judgements about the whole as providing the only or even the major body of data against which to check one's principles. One major path to changing one's intuitive judgements about some complex whole is through seeing the larger and often surprising implications of principles solidly founded at the micro level. Similarly, discovering that one's judgements are wrong or mistaken surely will involve overturning them by stringent applications of principles grounded on the micro level.[16]

Taking Nozick's advice in this passage leads to the conclusion that there <u>is</u> an intercommunity obligation. I argue below that there is an obligation to help another in catastrophic circumstances. This

obligation is so strong that it overrides the side constraints normally in operation. If we carry this to the macro level, better off communities will be obligated to assist a worse off one.

Take, for example, a subsistent level community, surrounded by much wealthier ones. Within this poor area are destitute children. The parent community itself is unable to help. But the surrounding communities could easily alleviate the situation. If Nozick denies that there is an obligation to help, then we must refer him to the above passage. There is an obligation at the micro level; why not at the macro level? Applying the principle found at the micro level, necessitates an obligation at the macro. The strong need for a redistributive state is now clear. The services I suggest are necessary, and they require financing. The state is the only agency in a position to fund and perform these services effectively.

The final section draws general conclusions from the arguments in each section, and points out what the implications are for Nozick's position. Nozick's assumptions concerning man are too naive to be accepted. His "package" of natural rights is not sufficient given the crucial problems which consideration of children create. Nozick's lack of argument for the absolute status of rights and liberty is a serious defect in his position. More specifically, this absolute status leads to morally unacceptable conditions, conditions which a simple market solution will not solve. The very nature of liberty itself requires a more extensive state than Nozick allows. The positive arguments I present require that a more than minimal state be in effect. This state will consist of functions in addition to those argued for by Nozick; and some of those functions will be redistributive.

FOOTNOTES FOR INTRODUCTION AND GENERAL REVIEW

1. Robert Nozick, Anarchy, State, and Utopia (Basic Books, Inc., Publishers, New York, 1974).

2. For a criticism of Nozick's moral foundation (criticism quite different from the points I raise), see: L. Francis and J. Francis, "Nozick's Theory of Rights". Western Political Quarterly, Volume 29, 1976.

3. Op.cit., Nozick, p.33.

4. Ibid., p.33.

5. Ibid., p.30-31. For a criticism of Nozick's use of Kant, see: J. Exdell, "Distributive Justice: Nozick on Property Rights". Ethics, Volumes 87-88.

6. Ibid., pp.33 and 171-172.

7. Ibid., p.34.

8. Ibid., pre.xiv.

9. Ibid., p.34.

10. Ibid., p.32.

11. Ibid., p.32.

12. Ibid., p.10.

13. Ibid., p.333.

14. Ibid., p.320.

15. Ibid., p.321.

16. Ibid., p.206.

CHAPTER I

CONTRACT, UTOPIA AND EDUCATION

In what follows I argue that Nozick's own theory is structured in such a way that it results in competing rights, leading necessarily, to extended state power. Nozick rests his arguments on an actual contract situation. The reward Nozick's theory offers is utopia. I argue that contracting and selection of utopia require knowledge. Children have a right to this knowledge. This right must be enforced by the state. Thus the state must be more extensive than allowed by Nozick.

Nozick provides an "invisible-hand" explanation to show how the state could arise by morally legitimate means. His explanation describes a hypothetical history of the state. The key to his explanation is voluntary consent. Individuals must <u>actually</u> contract with a protection agency in order that Nozick's rationale for the state be justified. According to Nozick, "...tacit consent isn't worth the paper it's not written on...".[1]

Although the later stages of his discussion consider problems of prohibition, risky acts and so forth, the foundations of the argument depends on an <u>actual</u> contract situation. Some political theories resort to a hypothetical contract in the derivation and assignment of character to the state. An appeal simply to a hypothetical contract is unacceptable for Nozick. He claims:

> If the hypothetical just history involves each person's consenting to the institutional structure and to any limitations on his rights (specified by the moral side constraints on the behaviour of others) it embodies, then if some actual person would not consent, one must view the institutional structure as unjust (unless it counts as just via some other hypothetical history). Similarly, one must hold the institutional structure unjust if the hypothetical just history involves some people consenting who didn't, and some now would not assent to others having done so.[2]

This passage states that if some <u>actual</u> person would not consent, or did not consent, then the institutional arrangement is unjust. This

forces Nozick's position to be restricted to an actual contract situation. The hypothetical contract cannot plausibly meet this requirement. A hypothetical situation can, perhaps, venture an estimate of what "rational, self-interested" agents may agree to; however, this is too weak a claim for the position Nozick requires.

My central criticism will concern the internal structure of Nozick's position. If Nozick's motives for prizing liberty, and his ideas regarding contract and utopia are to be made consistent, a more-than-minimal-state is necessary. This is due to the need for knowledge in making choices, as well as liberty to make them. In his discussion of utopia, Nozick recognizes a need for knowledge.[3] However, he does not pursue the implications of this need.

This knowledge requirement will present Nozick with the following dilemma: Without education of some sort, little sense can be made of Nozick's ideas concerning liberty and its relationship to utopia. If there is to be a morally binding (actual) contract, the individual involved must possess some knowledge as to the nature of the agreement. The state, if it is to be responsible for education, will be larger than the sort argued for by Nozick. On the other hand, if this need for education is not accepted as necessary, it is impossible to make sense of, and the reasons for, the nature of the liberty Nozick is defending. Nor can any substance be given to his talk of contract. In this respect his arguing for the minimal state would seem to be empty of any sort of rational justification.

The issue I will focus on concerns the amount of liberty Nozick wants the individual to retain. I claim that Nozick's arguments do not support such a strong emphasis on liberty once the state is established. Thus, a more extensive state can be argued for, one which would introduce some further restrictions on individual liberty to maintain the moral acceptability of contracts and avoid moral horror. Nozick's refusal to go beyond the minimal state lacks sufficient justification.

My discussion deals with two related issues, viz., knowledge as a precondition for choice in contracting, and in the selection of utopia. I discuss contracts in section (A) below. Section (B) follows with a

discussion of choice and its relation to utopia. Section (C) states the general conclusion of the first two sections. The separation into sections is for clarification purposes only. It does not denote a major separation of issues.

Section A

In his preliminary discussion of political philosophy, Nozick rejects various wild assumptions which he claims are often made to justify the state. For example, deriving the state through comparison with the most pessimistic Hobbesian state of nature leads naturally to the state being preferable.[4] Nozick's complaint is that such wild assumptions make this a no-contest game. Nozick prefers what he thinks is a more reasonable assumption. He claims:

> More to the point...would be to focus upon a nonstate situation in which people generally satisfy moral constraints and generally act as they ought. Such an assumption is not wildly optimistic; it does not assume that all people act exactly as they should.[5]

This assumption, taken alone, does not seem unreasonable. But if we call to mind that this assumption rests on Nozick's general assumption of a mature, rational man, a great deal of its plausibility disappears. The development of moral capacities is a complex process, greatly influenced by many factors. It at least assumes a minimal standard of living. People struggling to prevent personal starvation have little time to worry about developing the required moral capacities. For a child to develop such capacities, more than simply food and shelter are needed. There is good evidence that at least minimum care, affection and instruction are necessary. Without these conditions being met, it is unlikely that people will "generally satisfy moral constraints". The above passage of Nozick's is not as reasonable as it seems at first. If we are to expect people to act morally, as Nozick's passage demands, then we must first stipulate circumstances that make this expectation reasonable. I have only given a rough estimate of

these circumstances. It can be argued that if they are not met, the likelihood of an individual developing the moral capacities needed for Nozick's starting point, becomes increasingly small. As they diminish, the credibility of a pessimistic Hobbesian state of nature increases.

If we are to assume, as Nozick does, this moral capacity, we must also insure the preconditions are met. This second issue is the contentious point. It involves some sort of extensive apparatus (state) to insure that a sufficient number of these conditions are accessible to the individual. If this is not the case, Nozick's appeal to the moral character of men becomes unacceptable. It requires only a very brief look at history to show how immoral men can be. The mysterious "moral capacity" Nozick relies on is a product of culture. It is a learned part of our behaviour.

Nozick's assumption involves a great deal of complexity. It must be assured that the "proper" cultural traits and values are conveyed to the young of the society, at least if we are to be sure people will act in the prescribed way. How is this to be done? Since this issue is touched upon below, I will move on to a more serious assumption.

Keeping the above point in mind, problems arise with Nozick's contract situation. Nozick begins with individuals in a (Lockean) state of nature. These people contract with agencies to protect their rights. How do these people know what a contract is? Do they possess (prior to contract) all the requisite knowledge to make it morally binding? Nozick seems to have assumed a group of very intelligent people in his state of nature, people aware of the status held by various agencies (i.e. quality of service and so forth) and of the fact that they need protection in the said organized fashion.

If we alter the assumption, the results will be quite different. For example, each family unit is spread throughout the country; they have only minimal contact with each other. Lacking sophisticated communication and transportation, there is a diminished likelihood of agencies developing in the manner Nozick describes. In any event, the puzzle remains of how the individual comes to have the background necessary for contracting.

Section B

The establishing of the minimal state considerably changes the circumstances surrounding individuals. The state's job is to protect the contracting individual. Thus the individual is no longer in the circumstances of uncertainty inherent in a state of nature. There is, perhaps, still uncertainty due to inefficient enforcement on the part of the state, but the circumstances are not nearly as bad as in the state of nature. If they are equally as bad, or worse, then Nozick's derivation of the minimal state would collapse. The minimal state is the necessary starting point through which we may create a utopia. Nozick claims:

> No state more extensive than the minimal state can be justified. But doesn't the idea, or ideal, of the minimal state lack luster? ...Whatever its virtues it appears clear that the minimal state is no utopia. We would expect then that an investigation into utopian theory should more than serve to highlight the defects and shortcomings of the minimal state as the end of political philosophy.[6]

The minimal state is to be inspiring as well as right.[7] It's right because it supposedly violates no individual's rights; it's inspiring because it gives us access to utopia. Nozick's notion of a meaningful life is unpacked in his discussion of utopia. In a utopian situation the individual is left to choose the sort of life that suits him the best. This is provided, of course, that it does not violate anyone's rights. A utopia is not necessarily an individual effort, but is likely to involve groups of individuals voluntarily coming together in utopian communities. About these utopias, Nozick claims:

> ...each of them satisfies one very desirable description by virtue of how the worlds have been set up; namely none of the inhabitants of the world can imagine an alternative world they would rather live in, which (they believe) would continue to exist if all its rational inhabitants had the same rights of imagining and emigrating.[8]

Note the emphasis on choice. The real beauty in Nozick's conception of utopias is the likelihood of many different types flourishing. The option of which to join, remain with, and so forth, is left

up to the individual. But to make a fair choice, that is, a reasonable one, the individual must be at liberty to choose and be aware of the options available. What good is it to be free to choose from a large selection of utopias, if the only one you know about is the one you happen to be living in? This problem is particularly acute in the case of children. Nozick recognizes and admits that children (and people generally) must at least be made aware of the possibilities in regard to utopias. Nozick states:

> Children present yet more difficult problems. In some way it must be insured that they are informed of the range of alternatives in the world. But the home community might view it as important that their youngsters not be exposed to the knowledge that one hundred miles away is a community of great sexual freedom.[2]

Nozick does not say how the child is to be informed. I think that the only option open to Nozick is to put this educational job in the hands of the state. I claim this on similar grounds as those used by Nozick to justify the formation of the protection agencies (and then later to justify the dominant protection agency). This conclusion, if I am correct, makes the state far more extensive than it was designed to be.

I summarize my case as follows. The argument for necessary education parallels Nozick's <u>reasoning</u> in the development of protection agencies. The reason individuals seek a membership with a protection agency is, of course, for protection. But some necessary conditions exist (in the state of nature) which make a contract with an agency a good deal for the individual. These necessary conditions are relevant to my argument. They concern especially the uncertainty related to the administering of rights by the individual without the aid of a protection agency. Some of these reasons are discussed below, but it is important to understand these reasons as necessary conditions. If the individual could, reliably, administer his own affairs, he would <u>not</u> join a protection agency. These same conditions which force the individual to join a protection agency, force the role of administering education into the hands of the state. It is necessary for Nozick's

argument concerning protection agencies and the development of the minimal state, that uncertainty be part of the condition man finds himself with in the state of nature.

The two cases, however, differ in the following way: Individuals voluntarily contract for protection. The few who choose not to contract are given a minimal policy in exchange for not utilizing their right to punish. However, my claim differs from this sort of explanation. Education is a right the individual has a claim to, independent of the sort of contracting carried out in a Nozickean history of contracting. This educational requirement becomes a component in the "framework" of utopia; and it is independent of contract. If contracting for this service does take place, it would be a contingent, rather than necessary matter. It would at most complement the state's responsibility to educate its citizens up to a level adequate for them to contract reasonably.

A more extensive analysis of this problem depends on Nozick's distinction between a framework and a particular community. In his sketch of how a utopian system is to operate, Nozick suggests that the framework of utopia will be the minimal state. It is the end product of the dominant protection agency and is the only form of centralized authority outside of the community. Within the particular community individuals live out their utopia. As Nozick states, "there is the framework of utopia, and there are the particular communities within the framework of utopia".[10] It is in respect to this important distinction that Nozick says:

> The framework of utopia that we have described is equivalent to the minimal state.... We need not mesh our discussion here with our earlier one of dominant protection agencies beyond noting that whatever conclusions people reach about the role of a central authority (the controls on it, and so forth) will shape the (internal) form and structure of the protection agencies they choose to be clients of.[11]

I quote this passage to show that Nozick does in fact identify the framework of utopia with the minimal state. However, I am puzzled by certain sections of the passage. If the minimal state is to be the

utopian framework, how can we not mesh our discussion of protection agencies with our discussion of utopia? Also, the last section of the passage implies that there is still more than one agency for people to join. In the first section of his book, Nozick argued at length that one agency would become dominant by gaining a monopoly on force, and thus become the minimal state. His position seems to be slightly different here. I do not wish to pursue this now except to suggest that in the above passage the notion of "framework" seems to have taken on a different meaning. In other passages Nozick clearly means one framework (i.e. the minimal state). If there are, however, still several agencies, what are we to infer? That there are several minimal states? That there are several frameworks? This sort of questioning could raise many problems for Nozick. However, it serves my purpose to simply establish that the framework is distinct from the community, and this framework is the minimal state.

I return now to the problem pointed out earlier. How are people to be made aware of the choices concerning the various utopias? As I have said, this problem becomes particularly acute in the case of children. I think the possibility of community bias in the educational structure can be taken for granted. Even if a particular community attempts to be completely fair in its educational program, the possibility of mis-informing the people remains. For example, lack of information about other communities, inaccurate information, lack of funds to operate an educational system, etcetera, may be some possible reasons for inadequate education. And of course there is the problem Nozick points out: The communities perhaps desire to keep their citizens uninformed.[12]

Consideration would have to be given concerning what would be taught. Who would have input into the subject matter? A guess on my part would be both the community and the state. However, the essential fact is still that education (whatever shape its content takes) is necessary. And even though individuals have not directly contracted for all or any of the specifics regarding education, some minimal standard must be assured throughout all communities. To avoid bias and so forth, impartial teachers are needed. Also, an adequate system must

be used to ensure each individual would receive sufficient education.

The decisions concerning subject matter are very important. In his essay On Liberty, J.S. Mill shows great concern for this problem.[13] Although he is against any single organization (including the state) being the sole administer of education, he points out that the state may be the most practical way of meeting the necessary requirements. His main concern is to ensure good content in education. A person's choices are greatly influenced by the situation he comes from. What information we have in part determines what sort of choices we make.

Thus content becomes of primary importance. Biased subject matter seriously calls into question an individual's ability to make "free" choices. A community of fanatics (whatever their particular goal is) can hardly be trusted with the education of their young, at least when that community prevents its children from learning of other ways of life. It is plausible to argue that children raised in such an environment would have their ability to make choices restricted to the point of being negligible.

Nozick's defense of the minimal state is to protect liberty. The protection of this liberty is to allow us to select our own life plan from a range of alternatives (utopias). However, what utopia an individual perceives as being the most valuable (meaningful) to him will depend greatly on what "world view" he holds. For example, the separate school system complains that in a public system, the creation/evolution debate is not fairly presented. What "fairly" means here is problematic in itself. However, proponents of the creation view argue that many people opt for the evolutionary explanation, because this position is presented in a more favourable light. These are both theories. What one accepts as evidence for or against the "facts" in this debate, depends to a great extent on what one already believes. Presentation of content and epistemic position prior to examination of the subject material, has a direct influence in decision making.

If individual A attends a public school (and spends his time studying Darwin), will he make the same choices as B, who attended bible school (and studied, say, Creationism)? It is likely that a great

many of their decisions would be similar (all things equal). However, their dispositions to decision-making are radically different. This difference surfaces when serious life choices are being made. Choosing what utopia to live in, what agency to contract with, are such life choices. The differing "world views", and all the extra baggage accompanying each (i.e. particular morality, value system and so forth) has a great influence over what that individual will choose.

Nozick presents his case as simply a matter of individual X and set of commodities Y. Y is that range of choices available to X. X simply makes a "free" choice. However, the fact that humans have to learn in order to possess knowledge, that knowledge is important in decision making, and that what knowledge we have influences our choices, greatly complicates the simple structure Nozick would have us accept. Without considering these complications, little sense can be made of Nozick's defending the individual's liberty to make choices. Dealing with these problems leads to a more extensive state.

Section C

If utopia is possible it is dependent largely upon the individual's awareness of the choices he is faced with. Also, little plausibility can be given to Nozick's discussion of contract if the individual is not educated to some minimal standard of awareness. I think it is clear that, given Nozick's structure, an individual has a right to be informed of these choices. If this is not a right the individual possesses, then Nozick's whole argument for liberty and his discussion of utopia, are empty of promise.[14] This right is rather unique in a sense rarely discussed by Nozick. And its uniqueness is particularly damaging to his position. It is a positive right. Most of Nozick's effort is spent exhausting what the state cannot do, identifying areas where it cannot, justifiably, interfere with the individual. But the education right I have been dwelling on differs from this in two ways. First, it is not something that ought not be done to the individual; but it is rather something that must be done for the individual. Second, instead of

blocking the state out, it opens the door for limited involvement in the individual's affairs. Nozick's use of liberty and its relationship to utopia implies that awareness of possibilities is fundamental to liberty, and thus is the prior concern.

Nozick could, perhaps, respond by claiming that an organization geared to educate would arise in a manner similar to the protection agencies. But any argument of this sort does not escape the basic problem. It would have to set a standard throughout all communities, perhaps even to a greater extent than the minimal state does with protection. This would make the framework far more extensive than the realm of protection defined by Nozick, and thus more than the minimal state.

In my discussion of education there lies a further problem for Nozick. If my argument is correct, the following question arises: Who is to pay for the educational system? I have argued that this system is necessary, independent of contract. How are the administrative costs to be met? Nozick cannot appeal to the same client-agency relationship he began his theory with. No such relationship exists. Or, if it does, it does so in a contingent manner.[15] It seems that resort to a tax system is necessary. This tax collection would end up as part of the framework as well. Federal education implies federal taxation.

Nozick cannot accept such a tax system. He claims that it would violate individual rights. But how could Nozick guarantee the right to education? Possibly each would voluntarily give his share. However, not only is this unlikely, but what meaning would "voluntary" have under these circumstances? Does one voluntarily support something one must support? I do not believe this is the sense of voluntary Nozick desires. The dilemma remains. Either we override some Nozickean negative rights through taxation in support of a necessary institution, or the funding is not obtained, the system is not operative, and the right to information is violated. Which right ought to be respected over which? My answer: education must take precedence. It is a precondition of liberty.

The problem of education is especially serious for Nozick's position since it is an ongoing process. There will always be individuals (e.g. children) who require this service. If asked how exten-

sive this educational program need be, I would have no clear answer. But I suggest it is closely connected to the question: how complex is society? (utopia?). Education would have to be at least high enough that the individual would be able to knowingly contract.

I think that similar arguments could be run parallel to the one I have outlined here. These arguments could be such that a minimal standard of living becomes justifiable. However, much research would be needed to show the precise relationship between one's income and ability to make choices.

The above argument shows that a more than minimal state can be argued for, using Nozick's own premises. They show that a more extensive state is necessary if any plausibility is to be given to Nozick's account of contracts and utopia. A minimal state cannot be counted on to meet Nozick's own requirement of informing the individual. Nor can his assumption of an already knowledgeable contracting individual be accepted in the over-simplified manner Nozick presents. These arguments also throw doubt on Nozick's motives for defending the minimal state. The state is to be restricted in order to enhance individual liberty, yet without a more extensive state this liberty's value seems negligible. Thus Nozick's desire to restrict the state is arbitrary in two respects. First, it seems impossible for individual liberty to remain untouched and meaningful. Second, Nozick has not supplied adequate reason why this liberty is to remain so extensive. The reasons for the extensive liberty desired by Nozick are not self-evident, and in view of my criticisms of Nozick's position I think it fair to demand that he supply the necessary arguments to clear the educational hurdle, or alter his position on liberty as the basic untouchable right of individuals.

FOOTNOTES FOR CHAPTER I

1. Robert Nozick, Anarchy, State, and Utopia, p.287.

2. Ibid., p.293.

3. Ibid., p.330.

4. Ibid., p.5.

5. Ibid., p.5.

6. Ibid., p.297.

7. Ibid., pre.ix.

8. Ibid., p.299.

9. Ibid., p.330.

10. Ibid., p.332.

11. Ibid., p.333.

12. The full responsibility for a child's education cannot be left in the hands of the parents. We have enough evidence in our present society to show that the child may suffer through negligence or incompetence on the part of the parents. Are children to miss their right to an education because of negligent parents?

13. J.S. Mill, On Liberty, pp.176-180. New York, John W. Lovell Co.

14. Nozick emphasizes that an agency must inform the individual of its procedure, et cetera. What Nozick does not emphasize is what this involves. Informing individuals in an area the size of Canada requires that the agency do more than post a notice in Toronto City Hall. And if informing an individual is to be distinct from brainwashing, as Nozick would agree it must, then the problems I have been discussing must be considered. How can Nozick expect a minimal state to do all this?

15. This point has been discussed earlier in the paper. I will add that individuals will probably contract for more extensive amounts of education.

19. Ibid., p.57.

20. Ibid., p.57.

21. Ibid., p.57.

22. Ibid., p.58.

23. Further epistemic considerations call Nozick's more general claim into question. Is it true that I may permit anything to be done to me? For example, if I approach a friend and, complaining of a terrible headache (one I can simply no longer stand) ask this friend to shoot me, my consent hardly makes it alright that he do so. Our moral intuition demands that my friend consider other factors, such as the fact that I will in future be glad he refused my request. However, such hypothetical considerations by my friend are not necessary in Nozick's account. Such a consideration would be a form of paternalism. Nozick's account does not require any sort of paternalistic considerations; my friend may act on future considerations with respect to my request--but Nozick's position does not require him to do so. I think moral intuition requires that this form of basic paternalism be a necessary consideration on my friend's part. If Nozick wants to break with our moral intuitions on this point (it is clear that he in fact does choose to break), then the burden of proof is on Nozick to show that consent is a sufficient condition to permit any action (all things equal). Such proof is not offered by Nozick; our permitting by consent is merely stated as an unacquired right. Little else is said about it.

24. Op.cit., Nozick, pp.68-69.

25. Ibid., p.69.

26. Ibid., p.75.

27. Ibid., p.82.

28. For a discussion of problems related to this, see: C.G. Normore, Critical Notice of Robert Nozick. Canadian Journal of Philosophy, Volume 7, #1, March, 1977.

29. Op.cit., Nozick, p.96.

30. Ibid., p.88.

31. Ibid., p.89.

32. Ibid., p.146.

33. My discussion here is primarily phrased in terms of compensation. It is easy to change the example. Z commits a very serious crime; the penalty for this is life in prison. Assume only one parent. What happens to z?

CHAPTER II

POSITIVE RIGHTS AND INNOCENT THIRD PARTIES

In the first chapter I argued that a child has a positive right to education.[1] Further argument showed that the state is responsible for ensuring that this right is respected. In this chapter I discuss further issues related to the positive rights of children. I argue that Nozick accepts these rights in the case of children. However, I also argue that the balance of his theory is not consistent with what these rights entail under special circumstances. Exhaustive analysis of Nozick's position shows the inadequacies of his theory with respect to children's rights. The solution to these inadequacies parallel the solution in the preceding chapter. A more extensive state is required to ensure these positive rights as effective.

In the first section of his book, Nozick claims to derive the "minimal state" in a justifiable manner. This state is restricted to the function of enforcing individuals' rights. He claims that the anarchists' objection to the state, that any state violates individual rights and is thus immoral, ought to be taken seriously.[2] That is, the state is justifiable only if it does not violate individuals' rights. His method of showing this begins by assuming a (Lockean) state of nature. Then, through the further assumption of the rights to compensation and punishment (which are transferable), Nozick claims that the state would develop from individuals acting independently to protect these rights.

The discussion of compensation is complex. Nozick gives a considerable amount of detail to it. His disquisition is stated in such a way that the relationships of the individuals involved are quite straightforward. The complications of responsibilities to third parties do not play a major role in his discussion. These complications, when considered, can dramatically alter the outcome of the inquest, particularly when innocent victims are considered.

Very few individuals have the position of being "islands", simply

responsible for themselves. Human relationships are such that each one of us often has many obligations to others. These liabilities may be such that another's life is dependent upon our actions. Such is the case with the parent-child relationship. What is the status held by innocent persons, victimized by the punishment (or similarly in cases of compensation) of a person upon whom they are dependent? What happens to the child whose parents are imprisoned? Who is responsible for this child's care? Or, for a parallel problem in compensating, who is responsible for supporting a child whose parents must pay so much compensation that they can no longer support him?

It is usually taken for granted that a child has a positive right to care. This is a general right in the sense that everyone, being born as a child, has or had this right. However, the scope of the right is restricted. Usually this right is understood to be directed at the parents. Thus the question of moral duty is attached solely to the parents. The problem I intend to raise is, what happens in cases where the parent is unable to fulfill this duty? Specifically, is it allowable that an individual press his rights against the parents to such a point that the parents can no longer meet their obligations? I think this question has a two part reply. An individual with sufficient justification, may press his rights to this extent. However, if this is the case, then the parents' duty to the child is expanded to be shared by all. The scope of that child's claim is no longer restricted to the parent.

Of course, the widening of this scope hints directly towards paternalism. Nozick's position gives rise to paternalism when positive rights and various other circumstances are considered. I argue later that this role must be assumed by the state. The state cast in a paternalistic role is not allowable by Nozick. Paternalism involves redistribution. However, Nozick <u>may</u> be interpreted as accepting a form of rights held by children. Nozick states:

> ...once a person exists, not everything compatible with his overall existence being a net plus can be done, even by those who created him. An existing person has claims, even against those whose purpose in creating him was to violate those claims. It

> would be worthwhile to pursue moral objections to a system that permits parents to do anything whose permissibility is necessary for their choosing to have a child, that also leaves the child better off than if he hadn't been born.[3]

I think several things can be inferred from this passage. The existence of a person entails that certain things cannot be done to him. The rest of the passage is directed specifically at children. If any sense is to be made of "An existing person has claims,..." this must be understood as a claim to more than negative rights. It must be understood as a claim to some set of positive demands. For example, as a demand for food, shelter, care, etcetera; those things which we consider necessary for life. I am assuming that Nozick's last sentence, in the above passage, disallows parents having a child solely to satisfy their sadistic tendencies. However, it also must be taken to disallow having a child, finding this child boring by the time it reaches the age of three years, and thus allowing him to starve to death. The passage must be understood as stating that the child has some positive claim (in the sense of a right), not merely as stating an obligation on the part of parents <u>not</u> to do certain things to the child.

Nozick's position on rights leads to serious problems in matters such as these. The problem becomes more acute when a whole community, within Nozick's utopian framework, is on the losing side of a lawsuit. Who is responsible for the innocent in that <u>community</u>? A careful look at the rights to compensation and punishment in light of these problems will show that some changes must be made in Nozick's general understanding of rights. Rights cannot be accepted in the form Nozick suggests.

Nozick begins his book with a very strong statement of individual rights. He restates this, in various ways, always with the intention of emphasizing its importance. According to Nozick, the main purpose of his book is to examine the relationship between individuals and the state. He claims:

> Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong are these rights that they raise the question of what, if anything, the

state and its officials may do.[4]

Later Nozick claims, "a line (or hyper-plane) circumscribes an area in moral space around an individual".[5] In seeking an explanation of the individual-state relationship, Nozick begins his account with a non-political (non-state) phase. This is the Lockean state of nature. The object is to find a justification for some state activity.

Although Nozick begins with the assumption of a Lockean state of nature, he differs greatly from Locke, not only in the conclusions drawn, but in some of the details of the pre-political stage itself. Civil government is Locke's suggested remedy for the inconvenience of the state of nature. Nozick does not want to accept the extensive form of government offered in this Lockean suggestion. Thus Nozick accepts a form of civil government with powers restricted to the function of protection. Its function implies its name--"night watchman state".

Locke describes men in the state of nature as free, "...to order their actions and dispose of their possessions and persons as they think fit...without asking leave or depending upon the will of any other man".[6] Men are naturally in this state prior to assenting to any form of social contract. The law of reason is the only binding law. And this law:

> ...obligates everyone,...and teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possession;....[7]

I think on the above points, which are the most crucial, Locke and Nozick agree. However, the sorts of conclusions drawn by each are somewhat different. Locke puts some constraints on the individual as such, whereas Nozick is expressly against this. Locke claims:

> ...though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he does not have the liberty to destroy himself....[8]

Contrast this with Nozick:

> My nonpaternalistic position holds that someone may choose (or permit another) to do to him anything, unless he has acquired an obligation to some third party not to do it or allow it.[9]

This divergence points to the very strong individualistic strain

in Nozick. Although Locke and Nozick both accept a certain moral equality among men, there is an important difference in the type of rights this moral equality entitles the individual to. Locke's moral equality is based on man's relation to God. Nozick's moral equality is based on the nature of man himself. This basic difference leads to very differing implications for each of these writers.

Locke disallows suicide as an individual right since our bodies belong to God. Thus such acts would be immoral. Nozick, however, does not appeal to any such framework. He claims that the individual's "separate existence" is a fact. It is this fact which gives rise to our "self ownership" and the right to dispose of ourselves as we see fit (as long as we create no conflicting obligations to a third party).

To preserve this strong individualistic strain, Nozick finally breaks completely with Locke. After their brief union in the state of nature the strong difference in emphasis between the two writers shows itself. Locke claims:

> ...God hath certainly appointed government to retain the partiality and violence of men. I easily grant that civil government is the proper remedy for the inconveniences of the state of nature.[10]

The type of civil government Locke has in mind here is far more extensive than Nozick would allow. In Nozick's case only the minimal state (one hardly meriting the title of civil government in Locke's sense) is justifiable. It is the nature and strength of individual rights which restricts the state's role in Nozick's account.

Why does Nozick put such an extreme emphasis on liberty? Two considerations must be looked at. The first of these is the claim that it is the basic right necessary to enforce other rights. The second concerns Nozick's understanding of what constitutes a meaningful life.

The first consideration (one not emphasized by Nozick) gains strength by Lockean arguments. Liberty is the basic right which cannot be given up at any time. It is the right necessary for the actualization of other rights. Locke claims:

> This freedom from absolute, arbitrary power is so necessary to, and closely joined with, a man's

> preservation, that he cannot part with it but by what forfeits his preservation and his life together.[11]

The primary position of liberty is self-evident. In a state of nature--one of uncertainty, continuous change, and struggle for survival --liberty is the right necessary to ensure survival. Little appeal to contracts or community can be made at this time, since no stable or reliable ones exist.[12] Thus it is reasonable for Locke and Nozick to claim that liberty is a foundational right.

Much criticism has been directed at this area of Nozick. Some criticism attacks the concept of man suggested above.[13] Other criticism, from the left, is aptly summed up by Thomas Nagel:

> Perhaps the most difficult issue is posed by economic power and the political inequality it can create. The criticism from the left is that harmful concentrations of economic power cannot be attacked--or prevented from forming--unless individual actions are more closely restricted than is permitted by the liberal ideal of personal freedom.[14]

I believe Nozick might reply by simply rejecting the basic assumptions made by the leftist objection. I am more interested in attacking Nozick from within his own framework by showing how serious moral problems arise from his extreme defense of liberty. The development of an internal criticism forces the libertarians to re-examine their conclusions in light of their own premises. External criticism is damaging, but is often ignored. Internal criticism is damaging, and cannot be ignored; it demands to be answered.

The second consideration suggested above requires some understanding of what Nozick claims is a meaningful life. Nozick introduces what he calls the experience machine. This machine has the ability to live our lives for us (and more, to live lives we might want instead of our own). Would we plug in? Nozick answers negatively. His reasons--we want to do certain things, to be a certain way.[15] This machine cuts off the possibility for contact with any form of deeper reality. In answer to why we might want these sorts of things the machine cannot supply, Nozick suggests it is closely connected to man's ability to make long range plans relevant to his life. He states:

> I conjecture that the answer is connected with that

> elusive and difficult notion: the meaning of life. A person's shaping his life in accordance with some overall plan is his way of giving meaning to his life; only a being with the capacity to so shape his life can have or strive for a meaningful life.[16]

Although Nozick does not fully explore these points, his position is clear. A meaningful life is to be obtained through choice. This is why Nozick demands such a high place for liberty. Only through the use of his liberty can man obtain a meaningful life.

Assuming that everyone wants to protect their rights, the problem of the ability to do so becomes primary. This is particularly important for those who may not be strong enough to enforce them. Perhaps these people would form cooperative groups, each having the common goal of self-protection. However, Nozick suggests several problems with such an arrangement. For example, it would not always be clear who should protect whom, or on what occasion. It is even likely that some would take advantage of others under such an agreement.[17] Since the individuals involved would want to avoid problems such as these, Nozick suggests that a business-like organization would commence.

This business would sell "protection policies" to various individuals in its area. The arrangement would be such that as a client of the agency, certain of your rights would be enforced by the organization. It is not necessary that all your rights be administered by the agency (you may choose to withhold some), but it is likely this would occur. In becoming a client, the individual <u>transfers</u> his rights to the agency.

Several agencies might grow up in various geographical areas, each offering its service in a competitive market system. But the product being sold is unique; its worth depends greatly on the strength of the agency. Ensuring enforcement brings with it several problems, one of those being inter-agency disputes. If you insure with a weak agency, and a dispute arises with a client of a stronger agency, your claim may not be upheld. Nozick reports:

> The worth of the product purchased, protection against others, is relative; it depends how strong others are. Yet unlike other goods that are

> comparatively evaluated, maximal competing protective services cannot coexist; the nature of the services brings different agencies not only into competition for customers' patronage, but also into violent conflict with each other.[18]

These conflicts continue until one agency becomes dominant. Although one agency is now in a prominent position, it is not necessary that all individuals be clients of that agency. Some may choose to remain outside that agency, enforcing all their own rights. Whatever the actual arrangement may be, it rests on the assumption that individuals have rights, and that these rights are transferable. The aim of Nozick's argument is to show how the individual might best ensure that these rights are protected. Protection of these rights entails that the individual not be denied access to that to which he is entitled.

The central questions in an analysis of social relations bear on the nature of these rights. What does it mean to have rights? How do these rights affect interpersonal relationships? Do our responsibilities to others end with the enforcing of our rights? To begin this sort of inquest, Nozick poses a question aimed at clarifying the character of these relations. He asks:

> Are others forbidden to perform actions that transgress the boundary or encroach upon the circumscribed area, or are they permitted to perform such actions provided that they compensate the person whose boundary has been crossed?[19]

To claim that no boundary crossings are allowable would be unrealistic. This sort of claim would make virtually any social interaction impossible. Thus our focus of attention is best directed at examining the circumstances that govern morally permissible crossings. Nozick argues that <u>some</u> transgressions are allowed, provided that the necessary compensation be paid to the transgressed. However, there are certain other activities and circumstances that require prohibitions to be in effect. These prohibitions involve more than compensation; the additional element of punishment is the major distinguishing factor. Nozick claims:

> ...a system forbids an action to a person if it imposes (is geared to impose) some penalty upon

> him for doing the act, in addition to exacting compensation from him for the act's victims. Something fully compensates a person for loss if and only if it makes him no worse off than he otherwise would have been....[20]

Thus far Nozick has argued that some boundary crossings are permissible, provided compensation is paid. Other acts are prohibited. These require the factors of compensation and punishment. Leaving punishment aside, I will examine how compensation, in Nozick's account, is to operate.

He uses the economist's method (called an indifference curve) of allowing a range of goods to be acceptable as indemnification. That is, individuals may perceive various goods to be of similar value; in this respect they are indifferent to any one commodity relative to another. The interchangability of the commodity bundles reflects the consumer's indifference to a particular choice. Thus the graphic representation is termed the "indifference curve".[21]

Assume that my action always causes a downward movement. At any given time an individual occupies a particular position on this curve. If I were to cross someone's sphere (with or without permission) I alter their position. The principle of compensation requires that I act in some way, to place the individual affected in a position equal to the one he occupied prior to my action. This requirement assumes that he acts to recover any losses incurred; thus I must compensate for any discrepancy between his new position (after his efforts to recover) and the original point. This is a description of the mechanics involved in compensating. When can a crossing of the permissible sort take place? Nozick's answer has as its key factor voluntary consent. Someone may permit anything to be done to him, provided he has no obligation to a third party.[22]

Note that third parties play a role here. Voluntary consent opens the personal boundary. However, in giving this consent, one must consider any previous obligations which may mitigate against the contract at hand. This assumes that the individual is in a particular position with respect to an active bargaining process, and also that he

is in a sufficient epistemic position to assess the effects his bargain will have on the third party. But this is not always the case.[23] Nozick recognizes that prior negotiation may not always be possible, thus some crossings may occur (or be permitted to happen) without prior consent. The individual must be compensated later. The indifference curve would be used, in this case, to establish a "fair price", which would be collected as compensation by the transgressed.

Notice that the entire focus is aimed at that which is owed to the victim. The victim has a strong right to demand compensation. On Nozick's account, the victim has this right regardless of the circumstances and obligations that bind the transgressor. Nozick does not give any information about what would count as either excusing conditions or extenuating circumstances (ones that could nullify or restrict the right to compensation). If such circumstances are not considered, serious moral problems arise. Given that the child has the positive rights cited earlier, the question of who is responsible for the child in a worsened position must be answered. It is not sufficient that Nozick reply unsympathetically. For example, he may claim that there is no responsibility that falls on anyone. The child is now simply destitute, a candidate for mercy and charity. This reply assumes that the child has no positive rights. The assumption yields the conclusion that if no one is charitable it is merely an unfortunate circumstance for the child; however, there is nothing immoral or unjust about this lack of charity. I argued earlier that Nozick does accept positive rights in the case of children. This dramatically alters the situation. It is not the case that the child is simply a candidate for charity. It is the case that the child has the <u>right</u> to those things necessary to his survival. Thus on Nozick's own premise the unsympathetic reply must be ruled out. I argue below that the state must take on this responsibility.

Nozick suggests that certain acts be prohibited because they are generally feared, or they present a high risk situation. Some acts only concern the individual and thus compensation may be given to the victim. However, there are other acts (e.g. assaults, rape, etc.)

which create general public fear. This fear is a legitimate reason for the public to ensure that these sorts of activities do not take place. Nozick claims:

> Our argument for prohibiting certain actions, such as assaults, assumes that merely to require an attacker to compensate his victim for the effects of his attack (though not for any general anticipatory fear) would not sufficiently deter acts so as to leave people unfearful.[24]

This passage justifies prohibitions on grounds of general deterrence. Nozick claims his reasoning focuses upon the effects and consequences of not prohibiting.[25] His argument depends upon certain acts being fear-creating. Nozick attributes this condition to the non-global nature of fear. Further reason for prohibition is grounded on "risky acts". These acts may create fear, if they occur on a large scale. Their uncertain nature makes it difficult to establish whom they endanger (if anyone) or at what time. Risky acts may generally be prohibited with the additional clause that payments of compensation make them allowable. As Nozick states, "the action is permitted provided that compensation is paid to those whose boundaries are actually crossed".[26] But what about the individual wanting to do risky act X, who does not have the necessary resources to pay compensation? His act may not hurt anyone; it is not entailed by X that compensation will be required. Thus it appears that the individual is being prohibited because of his lack of resources, rather than due to the nature of X.

Recognizing this problem, Nozick suggests that if we prohibit a certain act on the grounds that it is too risky, we must compensate the individual who is disadvantaged by the prohibition. To illustrate this case, take the epileptic who is denied the privilege of driving in an automobile oriented society. Nozick states:

> By having the only way he can earn a living forbidden to him, he is disadvantaged as compared to the normal situation...those who are disadvantaged by being forbidden to do actions which only might harm others must be compensated for these disadvantages foisted upon them in order to provide security for the others.[27]

The entire discussion of risky acts assumes, first, that we know

the act is risky, and second, that the individuals (communities) who consider it so, have the needed resources to pay the required compensation for prohibition. Nozick would allow that certain prohibitions be placed on a whole community. However, the assumption that a community judges an act to be dangerous is not sufficient to prohibit; funds must be available for compensation.

The discussion of equalization focuses on first party rights. However, Nozick's discussion of "procedural" rights emphasizes a primary position for the second party. "Procedural" refers to the method of determining guilt and punishment. Part of Nozick's natural rights package is the right of all to punish. In the state of nature, each individual has license to punish his personal cases, and liberty to act for others. For example, he is at liberty to punish a murderer. This right is initially acted upon by any individual who implements the best known procedure.[28] But what if this procedure is unfair or unreliable?

A person may not have a dependable procedure for exacting justice. If this is the case, the accused has the right to resist the procedure. Nozick claims, "...each person has the right to have his guilt determined by the least dangerous of the known procedures for ascertaining guilt...."[29] This does not indicate what the procedure will be, only that the individual has a right to it. This includes a right to relevant information. If the method is not known to be fair, an individual may resist in self-defense. Thus a person may be prohibited from using a method on the grounds that it is too risky, i.e. there is a high possibility that the innocent may be punished, or that the guilty may be over-punished.[30]

A person joins an agency to insure that all these rights are complied with. The individual transfers his right to the agency. The agency acts in his name; it has no right of its own. Nozick states:

> ...the legitimate powers of protection agencies are merely the sum of individual rights that its members or clients transfer to the association. No new rights or powers arise; each right of the association is decomposable without residue into

> these individual rights held by distinct individuals acting alone in the state of nature.[31]

The association has no "free floating" rights of its own. Only individual rights exist; no grouping of these rights gives rise to "second order" ones. There are simply individual rights and claims. The only role an agency has is to act on behalf of its client. This brings to light two further points concerning the agency.

Although the agency has no right above and beyond the individual rights, it does carry a great amount of weight in the question of determining what a fair procedure is. The agency (through transfer) has the client's right to demand a fair procedure. Since a user of an unreliable method imposes an unreasonable risk upon others, the agency may prohibit this method on behalf of its client.

These factors lead the dominant protection agency to occupy a position of special authority in the administration of justice. Being the most powerful organization and obligated to enforce its client's rights, the dominant protection agency comes to have a de facto monopoly. The agency will judge its procedure to be the only reliable one and make it known as the only acceptable one. The agency must do more than simply assume that the method is known. It is responsible for ensuring that all people, subject to the procedure, possess the requisite knowledge. But in claiming that the agency's procedure is the only acceptable one, does this disadvantage the non-client?

Nozick admits that the monopoly this agency obtains does disadvantage a non-client. The agency and client benefit by ensuring that only their procedure is used. It leads to a much safer environment. However, under these circumstances the independent would claim he has been disadvantaged in that he is not allowed to enforce his right to punish. The agency must compensate for this disadvantage. Nozick suggests that it would grant a minimal policy to the independent. Thus the agency becomes responsible for everyone in its area. This, Nozick claims, is the minimal state.

According to Nozick, the only legitimate function of the state is the enforcement of individual's rights. The extent of the state

apparatus is a direct result of this activity. What happens if, in enforcing certain rights, the state victimizes the innocent? It seems that an easy answer would be that compensation is owed to the innocent victim. But a closer look at Nozick's position does not supply this answer. Compensation, in Nozick's discussion, took the form of payment due to injury. The manner in which he developed this idea implies that it concerns first and second parties, that is, only those directly involved in the activity. However, most of our actions have at least an indirect effect upon others. What happens to these third parties?

Individual Z has a child, z. Z in some way offends X. X demands that his right to compensation be enforced by the state. It happens that the compensation Z owes X, forces his standard of living to a subsistent level. This being the case, Z can no longer support z. Or, perhaps the punishment required is a jail term for Z. Regardless of the exact outcome, the question of interest is: what happens to z? It seems that z's lot has been greatly worsened by this lawsuit.

It does not seem reasonable to expect X to take over the care of the child. X is only demanding what he has a <u>right</u> to. Earlier it was noted that if someone was disadvantaged by being denied the only means by which he can earn a living, he must be compensated. But Nozick's discussion in that area was aimed at preventing someone from doing an action. Society pays the epileptic <u>not</u> to drive. In this case z is not doing anything that endangers our safety. Thus a claim for compensation on these grounds is unfounded.

Some comments of Nozick's concerning "preventive restraint" come close to supplying an answer. Compensation is owed if an individual is disadvantaged by a prohibition. How does a poor community afford to pay for prohibitions? Nozick addresses this question and replies:

> What if the public is too impoverished to compensate those who unrestrained would be very dangerous? Cannot a subsistence farming community preventively restrain anyone? Yes they may; but only if the restrainers give over enough in an attempt to compensate, so as to make about equivalent their own lessened position....[32]

In short, the public is only obligated to pay what they are able

to, without themselves becoming disadvantaged. One might want to infer from this statement that Z is only obligated to pay X an amount less than that which would disadvantage Z. But I think this inference would be incorrect. The quoted passage is specifically concerned with prohibiting action. The claim that X is enforcing against Z has no such conditions (i.e. Nozick gives none) restricting the payment due. X may demand that the state enforce his claim, even though its cost not only disadvantages Z, but all those dependent upon him. Nozick must be interpreted in this matter in a very stringent way.[33] X has a right to his place on the indifference curve and the state must enforce this regardless of the circumstances surrounding the other party.

Let us change my example by widening their scope. For "innocent victim" read: the aged, handicapped, mentally retarded, and so forth. These groups are unable to enforce their own rights. They are probably unable to understand or afford Nozick's protection policy. The main body of these groups are dependent upon others. The motive for accepting special rights for children is the fact that their natural situation makes them unable to fend for themselves in a world of negative rights. Since it is often the case that the above groups are in a comparable situation to that of children, it is plausible to hold that these people possess a set of positive rights similar to those of children. Nozick does not discuss this issue. I raise this point only to leave it and continue with the case of children.

The issue becomes more problematic when moved to the macro level. Nozick identifies the minimal state with the "framework" of his utopia. Within this framework people live in several communities, pursuing their utopian ideals. The framework (state) simply performs the job of enforcing individual rights within the community and at the inter-community level. What happens to the innocent in a community when it is on the losing side of a lawsuit?

For example, community A builds a large plant to mine nickel. This group was very poor prior to becoming industrialized, and now earns a modest profit. When building the company no one thought any damage would result. This venture on A's part was thought to be neither

fear-creating, nor a risky activity, thus no one considered prohibiting the action. But ten years later, community B (500 miles away) discovers its fishing and tourist industry to be almost extinct. The cause is "acid-rain".

Once a thriving community, B has now dwindled to a much lower income. Group B sues A. The amount required to compensate B forces A to a subsistence (or lower) level. It is no longer able to support its children or the aged. Who is responsible for these people? Their lot has been greatly worsened through no fault of their own. Perhaps they were not even share holders.

This problem is generated from Nozick's conception of rights. He presents them in the strongest sense. As outlined in the above, his discussion of compensation and punishment focuses entirely on the first and second parties. The offended individual has the right to demand that compensation place him in the position that he would have occupied if the transgression had not occurred. However, even with the assumption that the offended act to recover his losses, the compensation required under these terms could easily be massive.

Simply ignoring this problem could result in a great human tragedy. Yet Nozick rejects any sort of welfare scheme to help the needy. Suggesting (as Nozick might) that A ought to have insured themselves, is not an adequate answer. We see in our own market system how insurance will cover property and people, but steer clear of the type of lawsuit I have described (by limiting their liability). Even if the insurance was possible, perhaps the management board in A decided that the factory was so safe no insurance was necessary. Why should the innocent suffer due to negligent managers?

Nozick's notion of negative rights is so strong that he is blind to the above problem. The only side constraint he gives regarding X or B's right, is that their action not violate the (negative) rights of others. Further considerations are needed. If Z did not have a child, or A was made up entirely of rational adults, Nozick might reply unsympathetically. This answer becomes totally unreasonable when the effects on innocent parties are considered. These third parties' posi-

tions are not simply worsened, their means to survive are threatened.

The frightening thing about this threat is that apparently it does not violate, in Nozick's account, any rights of the innocent. I argued earlier that children have positive rights. If this is accepted (as I argue Nozick must accept) serious implications follow. I have suggested that if the parent is unable to meet his obligations to the child, then that child's rights expand in their scope. Nozick's account of rights is aimed at ensuring that all rights are respected. This being the case, the child's rights need to be enforced. Nozick has focused entirely on the parties in the dispute. But the questions of importance now are: Who enforces these positive rights, and what effect does this have on Nozick's position?

Nozick has argued that one agency gains a monopoly on the enforcement of rights. I think the inference to be made is that the state must enforce the positive rights of the child. That is, the state enforcing the lawsuit must take on the moral duty at hand. The state is thus caught in a double bind. On the one hand, it must enforce the lawsuit. On the other, it must take up the moral obligation to the child. However, Nozick has restricted the states' power in such a way that the latter is not possible. As was pointed out above, the state has no rights of its own, and is restricted to the job of enforcing negative rights only. The consideration of children as innocent victims requires a more extensive state. This state must be able to ensure the positive rights of the child.

Innocent victims are not simply candidates for charity. They have rights. It is an unjust system that disregards these rights. Ensuring that these positive rights are respected requires a more extensive state than Nozick's position allows. Furthermore, considerations of cost raise financial questions. Enforcing these rights will require funding. Who will pay? This matter is discussed in Chapter III.

FOOTNOTES FOR CHAPTER II

1. See p.4 of Introduction. Also, for a clear discussion of the distinction between positive and negative rights, see: Isaiah Berlin, "Two Concepts of Liberty". In Political Philosophy, ed. Antony Quinton. Oxford Readings in Philosophy.

2. Robert Nozick, Anarchy, State, and Utopia, p.XI.

3. Ibid., p.38.

4. Ibid., pre.ix.

5. Ibid., p.57.

6. John Locke, Two Treatises of Government, "Book II", chapter 2, section 6. Everyman's Library, Dutton, New York.

7. Ibid., chapter 2, section 6.

8. Ibid., chapter 2, section 6.

9. Op.cit., Nozick, p.58.

10. Op.cit., Locke, chapter 2, section 13.

11. Ibid., chapter 4, section 23.

12. The claim that no contracts can be made is too strong. On Locke's account, and I think on Nozick's as well, some contracts can be made. But the nature of these contracts (especially enforcement, etc.) is very uncertain. Chances of long range, reliable contracting, is even more remote.

13. See: B.J. Diggs, "Liberty Without Fraternity". Ethics, Volumes 87-88, 1976-78. The basic objection is that Nozick does not consider the social character of human life.

14. Thomas Nagel, "Libertarianism Without Foundations". Yale Law Journal, Volume 85, 1975. P.148.

15. Op.cit., Nozick, p.43.

16. Ibid., p.50.

17. Ibid., p.15.

18. Ibid., p.17.

CHAPTER III
RESOLVING THE CONFLICT BETWEEN POSITIVE AND NEGATIVE RIGHTS

As previously discussed, Nozick accepts a side constraint view of morality.[1] According to Nozick, "The rights of others determine the constraints upon your actions...The side-constraint view forbids you to violate these moral constraints in the pursuit of your goals...."[2] But what is to be done when rights conflict? In particular, what is to be done when a child's positive rights conflict with an adult's negative rights? In what follows I argue that these positive claims take precedence over the negative rights of the adult community.

Although Nozick lacks any argument for the absolute status of side constraints, he continually treats them as though they are absolute. This can be seen by his equating taxation with forced labour and other such claims.[3] Nozick's omission on this point, and positive arguments against the assumption that side constraints are absolute, show the need for a more extensive (and redistributive) state.

I am concerned with how Nozick's theory handles "moral horrors". Nozick does not deal directly with this issue. His comments on various other questions concerning our obligations to others in desperate circumstances, lead along an ambiguous path. Of course, according to Nozick, our main obligation to others is to respect their (negative) rights. But what obligations we have towards others beyond this one, is not clear. When the need to pinpoint the exact status of side constraints arises, Nozick offers no direct response. In a footnote Nozick states:

> The question of whether these side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid.[4]

Nozick's omission on this point is an important one. What, in his account, is a catastrophic moral horror? And what happens if there is one? Nozick provides no clear response to these questions. However,

some of his comments are relevant to this issue. For example, in his discussion of punishment, Nozick states the matter such that anyone has the liberty to punish--but no obligation to do so. Nozick states:

> Certain wrong doings give others a liberty to cross certain boundaries (an absence of duty not to do it);...Talk of a right to punish may seem strange if we interpret it strongly as a right which others must not happen to interfere with or themselves exercise, rather than as a liberty to do it, which others also may have.[5]

Thus any individual has the liberty to punish a murderer. Yet no one, it seems, has the moral obligation to do so. Since the victim is dead, and perhaps no one else is interested, the murderer may go unpunished. This lack of obligation towards others is highlighted in another discussion of Nozick's. He gives an account of several "Robinson Crusoes" who work separately each on their own island. One day they discover each other. The question is: can one, in worse circumstances, make a claim over the other's holdings? Nozick replies:

> Rather than its being the case that no one will make such claims in the situation lacking social cooperation, perhaps the point is that such claims clearly would be without merit...In the social noncooperation situation...each individual deserves what he gets unaided by his own efforts; or rather no one else can make a claim of justice against his holdings.[6]

It is clear that according to this passage, no one in a worse situation has a right to any holdings another has full share in. Those with the holdings are under no obligation to share. It seems that this passage is intended as a strong statement. What if the individual is not merely in a worse situation, but in a desperate one? Do I still have as strong a claim over my holdings and lack any moral obligation in a situation of moral horror? Nozick is ambiguous on this point; given the general gist of his claims, I think a strong interpretation is that the side constraints are intended to be absolute. However, Nozick cannot justify such a position. The result of the strong position would be the condoning of "catastrophic moral horrors". On the other hand, if one accepts the weaker interpretation, that moral side

constraints can be overridden, Nozick is forced to accept a more extensive state.

If the stringent interpretation is assumed, the possibility of many moral horrors immediately confronts us. By taking an example the point can be made at a more intuitive level. A small child wanders over to a shallow wading pool and falls in. If unaided the child will drown. Standing at the edge of the pool is a healthy, normal adult. This person is fully able, with little effort, to aid the child. It is obvious our moral intuitions demand that the adult act. If it was not a healthy adult but a quadriplegic, we would have no such intuitions. It is obvious this individual cannot help. Perhaps if the adult was in danger of drowning, we would not expect action. But as it is we do expect some action.

Passiveness, under these circumstances, results in a case of moral horror. Nozick argues that there is no clearly defined set of moral rules to which we have access and which we may all interpret adequately enough to follow. Although there may not be a "clearly defined set of moral rules", there are strong moral intuitions that allow for the recognition of moral horror. A very widely publicized case (which has become a case study in social psychology) helps make my point.[8] In 1964 Kitty Genovese was stabbed to death on a public street in New York city. A large number were said to have observed the murder from their apartments. No one even phoned the police. The case was discussed world wide because of the horror of a stabbing which took over half an hour to complete, and could have been stopped by a phone call.

The two examples share some points, but differ in others. In the first example, no rights (on Nozick's account) are being violated. The case of Kitty Genovese involves the violation of her rights. However, in neither case does the issue of rights violation seem of primary importance. The horror of a desperate situation is what immediately gives rise to the question of obligation. In the first example, only one individual is in a position to act, the second has many in that position. In each case a strong, short term response is required.

Nozick's position on nonintervention in an individual's affairs

is justified on the grounds that the individual's liberty would be restricted by intervention. But is this liberty worth so much that we cannot even (morally) expect a phone call? In his discussion of side constraints Nozick undertakes an investigation of the status of nonhuman animals. The issue is meat eating. Nozick claims:

> The question is: do they, or rather does the marginal addition in them gained by eating animals rather than only nonanimals, outweigh the moral weight to be given to animals' lives and pain? Given that animals do count for something, is the extra gain obtained by eating them rather than nonanimal products greater than the moral cost? (Nozick's emphasis.)

Two pages later Nozick answers: "...the extra benefit Americans today can gain from eating animals do not justify doing it. So we shouldn't."[10] (Nozick's emphasis.)

The case I present is not exactly parallel, but the question I ask is very similar. It is a question of weighing moral cost. In my examples the question is: Is the liberty that side constraints guard so valuable that it justifies there being no overriding moral obligation in cases of moral horror? Is the extra gain obtained by the (absolute?) status of side constraints greater than the moral cost? I think this demands a negative reply. Nozick assumes that animals count for something. That they do justifies his conclusion. In my argument I assume that human animals "count for something". Thus there is a moral cost. This moral cost justifies my conclusion that an obligation exists on our part to act to avoid moral horrors; even if this involves what Nozick would call a violation of individual rights.

The cost of moral horror justifies some restrictions on individual liberty. Problems arise when we consider the medical cost case. That is, is it justifiable to bleed a community of all its resources in order that an individual have a very expensive operation? No, the restrictions which this case demands cannot justify forcing the community to pay. But the restriction on liberty required to avoid moral catastrophe need not be so extensive that it exclude the possibility of a meaningful life for the restricted individual. It is not plausible to argue that in obligating an individual to assist a drowning child,

or phone the police, one thereby restricts that individual freedom such that a meaningful life is not possible. Nor is it plausible to claim that some restriction makes the pursuit significantly more difficult. The restriction is far outweighed by the cost thus avoided. My appeal is to that individual's moral cost; it is not an appeal to the general social good.

Thus far I have assumed a stringent interpretation of Nozick. I conclude that moral side constraints can be violated to avoid moral horror. The cost factors in terms of obligation and restriction of liberty bear this out. Nozick does not direct any effective arguments against this issue. His only argument is one concerning the value of liberty. It has been shown that in these cases this argument is not viable. If one is to accept the weaker interpretation of Nozick's position, a similar conclusion would be drawn, but by a shorter route. Either way the conclusions correspond.

Some writers have suggested that in the case of moral horror the normal moral concepts and guides no longer apply. Charles Fried states:

> ...the concept of the catastrophic is a distinct concept just because it identifies the extreme situations in which the usual categories of judgement no longer apply.[11]

According to Fried, the case of moral horror leaves our usual categories of judgement in a sort of limbo. We are simply left groping for the best available solution; at the same time, lacking any rigid standards of judgement. In Nozick's case his foundation of natural rights would thus be overridden by circumstance.

It is important to note that the examples used in the above argument require only a short term response by those in the immediate position to help. However, there are other sorts of moral horror. For example there are types which are not simply single events, but are on-going problems. These may require long term action on the part of many individuals. These types of moral problems are of special interest in examining Nozick's position.

Ongoing moral horrors freeze two avenues of exit for Nozick. First, in reply to my Chapter II, Nozick could attempt the claim that

the described circumstance requires a short term violation of rights. That is, given the problem of children, emergency action would be taken. However, if the moral horror is ongoing, the emergency situation becomes the norm. Thus, this reply of Nozick's is inadequate. Second, Nozick may appeal to a similar position held by Fried. However, since the moral horror is ongoing, his moral categories would always be in limbo. Thus, this avenue is unacceptable as well.

As an example of this sort of problem I will pursue the case of destitute children. Nozick would probably point out that the obligation to care for a child rests with the parents. But I am interested in the case where there are no guardians. They are in this position through no fault of their own. Cases such as these can qualify as moral horror. If the child is in a subsistence community, where there is no aid possible, then it is not reasonable to deny that aid need be given. But in a society such as ours, one of plenty, a child faced with starvation is a moral horror. The cost of the remedy is far outweighed by the cost of the tragedy.

As it happens, in our society, there are many such cases of destitute children. It creates a continuous obligation on the part of all individuals. It would be unfair to put the burden of a child's care on the shoulders of a particular individual. The difficulty is to see a reason for hanging the obligation on that particular person. In the first case I described, it is clear that the obligation falls on that adult who is present. In the second example, this is not as clear. It seems the obligation to call the police (or other such action) falls on all of those who were witness or were aware of the stabbing. The case of the destitute child is similar to the second example in that the obligation to support this child is likely to be shared. It is a moral horror allowed by all in the community if that child dies through neglect.

Unfortunately not all things can be done without cost. If the obligation is to be fulfilled, there will be cost. In the case under discussion a financial burden is the immediate focus of attention. But this burden has further implications. The obtaining of this financ-

ing involves the restriction of liberty. I have argued that this restriction is justified by the moral benefit gained. What does all this mean for Nozick's theory?

The conclusions to be drawn are twofold. First a more extensive state is required; this state will be redistributive. Secondly, some further conditions will be placed on Nozick's "entitlement theory". It is necessary to examine Nozick's position in the market place with some detail. The structural criticism I argue for requires that some changes be made to the entitlement theory. As this theory stands, it is unable to adequately handle the problems I have been discussing. To make this point some detail is necessary. Approaching the matter in this way will also allow the reader to see how very far reaching the necessary alteration is.

According to Nozick, a central agency functioning in a redistributive fashion transgresses the individual's realm by disregarding the right of noninterference. Redistributive activity is seen by Nozick as forcing the individual to give up a share of his (just) holdings. As mentioned above, Nozick equates transgressions of this sort with forced labour. It is a direct violation of that individual's rights concerning his holdings. Does Nozick allow any form of redistribution?

The minimal state's monopoly on force <u>seems</u> to perform a redistributive function. Nozick points out:

> If some redistribution is legitimate in order to protect everyone, why is redistribution not legitimate for other attractive and desirable purposes as well? What rationale specifically selects protective services as the sole subject of legitimate redistributive activities? A rationale, once found, may show that this provision of protection services is <u>not</u> redistributive. More precisely the term "redistributive" applies to types of <u>reasons</u> for an arrangement, rather than an arrangement itself.[12]

The interesting part of redistribution is the reason for such activity. Nozick claims to give an explanation of how a monopoly on force could be legitimate.[13] This was done by way of an "invisible-hand" explanation.[14] According to Nozick, this method explains how an overall "pattern" comes about without anyone having the final "pattern"

in mind. The end result flows from many individual events, each with their own motive and goal. No event has as its goal the overall pattern. Nozick claims this sort of explanation has the advantage of explaining the realm without using any of the notions of that realm. Thus it is a "fundamental explanation"; it allows us to understand everything about the realm.

Nozick uses such an explanation to account for the state having a legitimate monopoly on force. This account considers the problems faced by individuals administering their rights in the state of nature. These individuals join a protection agency to ensure that their rights are respected. In turn, one of several protection agencies becomes dominant. This dominant protection agency then extends a "minimal policy" to all non-members; by this act it gains a de facto monopoly on force. It is then considered a minimal state.

Nozick's account of the minimal state begins with his discussion of protection agencies.[15] How these agencies culminate in a minimal state is not the main interest here. But <u>why</u> people join a protection agency is important. These agencies arise from a (Lockean) state of nature. These can best be described as circumstances of uncertainty. In the state of nature "...a person may lack the power to enforce his rights; he may be unable to punish or exact compensation from a stronger adversary who has violated them".[16] For the most part, Nozick confines his discussion in this area to punishment. However, the main thrust of his argument is obviously more general. The problem for the individual is to enforce any rights he may have. If this is not the case there would be no need (nor support) for protection agencies. In becoming a minimal state, the dominant protection agency accepts this responsibility for all in its area.

Nozick wants to stop the process here. No other function by the state is allowable. I have argued that there are further considerations. In what follows I argue that these considerations entail more extensive action by the state. I think that Nozick avoids this conclusion by assuming a fully adult society. This false assumption lends plausibility to his claims regarding side constraints.

After rejecting a state-controlled economy, Nozick opts for one based simply on individual acquisition and exchange. His fight for individual rights leads him to suggest an entitlement theory.[17] Nozick states:

> 1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
> 2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.
> 3. No one is entitled to a holding except by (repeated) application of 1 and 2.[18]

The bulk of the criticism aimed at Nozick focuses here.[19] A number of writers attack Nozick's use of "holding". They argue against his position by identifying different senses of how something can be held. Others attack his first premise, asking how an initial acquisition is justified. Still further criticism questions the "historical basis" of the entitlement theory.

According to Nozick, "Justice in holdings is historical; it depends upon what actually happened".[20] Thus if all acquisition and exchange has been in accordance with the above three principles, the resulting distribution will be just. Are the present holdings just? To answer this Nozick claims we must make reference to what actually happened. No reference to present patterns is necessary. In making this claim Nozick steers away from "pattern" forms of justice. A pattern form takes basic principles (eg. merit, etc.) and claims that all distributions ought to conform to this basic principle. It is claimed that these principles form the foundation for the final distribution of goods. Nozick states:

> Let us call a principle of distribution <u>patterned</u> if it specifies that a distribution is to vary along with some natural dimension, weighted sum of natural dimensions, or lexicographic ordering of natural dimensions. And let us say a distribution is patterned if it accords with some patterned principle.[21] (Nozick's emphasis)

According to Nozick, the entitlement theory is not patterned. The process and resulting distribution of goods within the theory follows

no "natural dimension", as a patterned theory requires. In addition to this theory, Nozick introduces two stipulations. These complicate the theory considerably. They are: the rectification principle and the proviso.

The rectification principle is Nozick's attempt to appease the critics who ask how past injustices are to be compensated. Critics claim that the entitlement theory (although historical in the sense of backward looking) lacks any just (or real) historical foundations. Nozick does not give a clear statement of this principle.[22] The outline he does suggest does nothing to surmount the massive objections leveled at it.[23] Some say that these past injustices would force a form of strict socialism. Others claim that rectification requires equality as the necessary starting point. As damaging as I think these criticisms are, my concern in this section is with a different aspect. Thus I will move on.

What is the final outcome of the entitlement theory? Are all the holdings in accordance with it always just? Or are there circumstances which force alterations? Nozick suggests that there are such circumstances. Thus he includes a proviso for extreme situations.

This proviso is an altered form of the Lockean proviso.[24] Nozick's modified version is designed to govern acquisition and holdings under unusual circumstances. Briefly stated, Locke's proviso requires that "there is enough, and as good left in common for others".[25] Locke suggested that this proviso govern acquisition. He says very little concerning what is already held. Locke does stipulate a "spoilage clause", but this is not of concern here.

According to Nozick the proviso has two important interpretations. Nozick describes a stringent interpretation such that no person may lose the "opportunity" to improve his situation through someone else having appropriated something. Nor may the appropriation be such that the individual is no longer able to freely use what he could previous to the acquisition.[26] Rejecting this form of the proviso, Nozick opts for a weaker version. He states:

> A weaker requirement would exclude the second way,

> though not the first...for though person Z can no longer appropriate, there may remain some for him to use as before.[27] (Nozick's emphasis)

The formulation of property rights in previously unowned things must be such that no person's position is worsened in losing their liberty to use it. If there is a loss of liberty, compensation must be paid, or, the acquisition will not be allowable. The proviso "will handle correctly the cases...where someone appropriates the total supply of something necessary for life".[28] Nozick also suggests that this proviso bars someone from charging certain prices for a commodity.[29]

This ends the entitlement theory. The theory is not redistributive. The reason[30] for the rectification principle and proviso avoids the charge of redistribution. Notice the character of these two conditions. The rectification principle requires that some past injustice has occurred which must be compensated for. This conpensation may take the active form, but it assumes a past injustice. The proviso is passive. It assumes a catastrophe. But it does not require any action on the part of the property owner. The proviso is negatively defined such that the owner must allow you access to the waterhole, but he need not help you drink. The destitute child does not qualify for either of these conditions. Obviously the child is not able to trade for help on the open market. As Nozick's theory stands it is not able to handle such situations.

To establish a qualifying case, that is, in order to decide if a child is destitute, a fair procedure is necessary. I claim this for much the same reason Nozick gives in his discussion of "procedural rights".[31] Given surroundings of uncertainty, bias, self-interest, et cetera, there is a need for a known, fair, reliable procedure. (Nozick gave these reasons for joining a protection agency.) Otherwise no individual will know when or how much he must contribute to discharge his obligation. Also, if left as an individual decision, it is likely each will decide he is only responsible to contribute a lesser share. In dealing with punishment, Nozick argued that the dominant protection agency (and later the state) was the only agency able to ensure the

required procedure. If this is true, it is also true in the administering of the social obligation under discussion.

The fact that a central agency, such as the state, must administer the assistance program comes into sharper focus when we consider the nature of the required activity. The identifying of cases in each community, proper administeration of care, et cetera, requires a consistent and ongoing organization. The problem itself is one which regularly occurs. The care of a child differs from other catastrophic situations in that it cannot be solved by a short term, decisive act. Exactly what form this care takes is important, as it influences the child's life fundamentally. We cannot simply deposit cash at the orphanage and expect the child to go shopping. Nor can we expect the care of the child to be adequately dealt with by having various people help out a day at a time. The care needed requires active, consistent, ongoing work by competent individuals. Thus the only adequate method of dealing with this sort of situation is through the state apparatus.

I pause here to summarize. In Chapter II I argued that children have positive rights. In this chapter I have argued that these positive rights override the negative rights held by the adult community. If the positive rights are not considered to be the prior concern, morally unacceptable situations arise. Since these moral problems are ongoing, short term solutions are inadequate. The state is the only apparatus able to enforce the positive rights on an ongoing basis. Thus the state must be larger than the minimal state Nozick defends.

The extended state activity required raises the need for some further restriction on the entitlement theory. The funding required to discharge this obligation will most easily take the form of taxation. As mentioned above, the types of cases under discussion do not qualify for the rectification principle, nor the proviso. Thus some additional condition is required. This condition would virtually always be in operation. Thus its influence on the entitlement theory would be continual. The type of influence this "requirement" has, requires both a restriction on the market and some form of active redistribution of goods.

It is unlikely individuals will contract for the required funding. Therefore the state will be forced to adopt a form of taxation, thus becoming redistributive. This Nozick has rejected. However, I have argued that this redistribution is necessary and justified, since obtaining funds for this activity must be ensured. People may assume it is someone else's responsibility to aid, or that someone already has aided. But perhaps the strongest motive for a tax system is a result of human character. This is aptly summed up by Thomas Nagel:

> It is acceptable to compel people to contribute to the support of the indigent by automatic taxation, but unreasonable to insist that in the absence of such a system they ought to contribute voluntarily. The latter is an excessively demanding moral position because it requires voluntary decisions that are quire difficult to make.[32]

Nagel claims that certain grounds justify forcing a person to do something. Whereas demanding that this person do that act voluntarily, is an excessive demand on the will. Unfortunately, reliance on voluntary contributions is likely to leave the destitute in much the same position they occupy prior to the request for donations. Thus, resort to a simple market solution is unacceptable. The market, left unobstructed, cannot be relied upon to solve this issue.

Nozick must recognize the need for extended state power, and some redistributive activity. His assumptions concerning the human situation are too naive to be accepted. The defense of liberty he does offer is not great enough to justify "moral horror". The structure of Nozick's "natural rights", is presented in such a manner that moral horrors, of the sort described, are inevitable. A weaker interpretation of his position can be seen to make allowances for this problem. Yet, in examining the entitlement theory, no conditions are suggested by Nozick to handle these situations. Our obligation to avoid such catastrophes demands that our liberty be restricted to a limited degree. This requires alterations in the core areas of Nozick's position. Primarily the alterations will be directed at the status of "natural rights" and the recognition of binding obligation to others independent of contract.

FOOTNOTES FOR CHAPTER III

1. See: "Introduction and General Review".

2. Robert Nozick, Anarchy, State, and Utopia, p.29.

3. Ibid., p.172. See: A.H. Goldman, "The Entitlement Theory of Distributive Justice". Journal of Philosophy, December 1976, pp.828-832. Goldman claims that Nozick misrepresents the issue of taxation.

4. Ibid., p.30.

5. Ibid., pp.137-138.

6. Ibid., p.185.

8. See: Jones, Hendrich, Epstein, Introduction to Social Psychology, p.286. Sinayer Associates Inc., Sunderland, Massachusetts, 1979.

9. Op.cit., Nozick, p.36.

10. Ibid., p.38.

11. Charles Fried, Right and Wrong, p.10. Harvard University Press, Cambridge, Massachusetts, 1978.

12. Op.cit., Nozick, p.27.

13. Ibid., pp.65-78, 88-113. In these sections detailed discussion explaining how protection is allowable, are given.

14. For a criticism of Nozick's "invisible hand", see: Holmes, "Nozick on Anarchism". Political Theory, Volume 5, #2, 1977.

15. Op.cit., Nozick, p.12.

16. Ibid., p.12.

17. Ibid., p.150.

18. Ibid., p.151.

19. See: T. DeGregori, Market Morality: Robert Nozick and the Question of Economic Justice. Also, Varian, Distributive Justice and the Theory of Fairness.

20. Op.cit., Nozick, p.152.

21. Ibid., p.156.

22. Ibid., pp.152-153.

23. See: R. Litan, "On Rectification in Nozick's Minimal State". Political Theory, Volume 5, #2, 1977.

24. See: J. Waldron, "Enough and as Good Left For Others". The Philosophical Quarterly, Volume 29, #117, October, 1979. Waldron argues that Locke has far stronger requirements than the proviso. Waldron suggests that the important requirement is that when there is enough, the extra be used for the betterment of mankind.

25. John Locke, Two Treatises of Government, section 27.

26. Op.cit., Nozick, p.176.

27. Ibid., p.176.

28. Ibid., p.179.

29. Ibid., p.179.

30. Ibid., p.27.

31. Ibid., p.96.

32. Op.cit., Nagel, "Libertarians Without Foundations". P.157.

CONCLUSION AND GENERAL REMARKS

In Anarchy, State, and Utopia, Nozick set down the main themes of libertarianism. The central focus of this position is the nonviolation of individuals' rights. Nozick negatively defines these rights. For example, the individual has the right not to be interfered with in pursuing the sort of life he chooses. Although positive rights are given a role, they do not receive the attention, nor the emphasis, given to the negative structure.

I have reached into the libertarian framework and drawn positive rights to the surface. I have argued that the position held by Nozick contains positive rights for children. Further argument showed that consideration of these rights justifies a more extensive state than Nozick accepts.

According to Nozick, all the functions of the state must be justified by actual contract. Redistributive activity by the state is considered a violation of individuals' rights. The state, operating in this fashion, is thus considered immoral.

I have argued that Nozick reaches and defends this position by assuming an adult community. Although he allows that children have certain special claims, Nozick does not seriously consider the implications of these claims. I have stated that these claims take the form of positive rights. These positive rights take priority over the rights of the adult community. The enforcement of these rights entail redistributive activity on the part of the state.

Nozick assumes that "market solutions" will handle virtually all problems. However, I have argued that Nozick's market is not designed to cope with the problem I have raised. The exhaustive discussion of the Entitlement Theory in Chapter III, showed that his theoretical market system contained no clause that could be accepted as adequate for the case of children. The rectification principle assumes a past injustice. The proviso is essentially passive in nature. Thus, neither condition assists the destitute child. The enforcing of positive rights

requires direct state activity. The sort of activity required needs to be funded. The only practical way for the state to obtain the funds, is through intervention in the market place.

In Chapter I, I argued that Nozick's discussion of contract and utopian selection requires knowledge as a precondition. This knowledge must be assured as fair and accurate prior to the making of contracts or selection of utopia. The state is the only agency able to provide this service.[1]

In Chapter II, I argued that positive rights are of primary concern. Chapter III extends the argument of Chapter II. In Chapter III, I pointed out that children present Nozick with the possibility of ongoing moral horrors. Thus, short term solutions are inadequate.

Nozick's argument defending the minimal state, as the only permissible state, fails. Consideration of children calls for and justifies a more-than-minimal state. The problem now facing the libertarian is: How much more state activity is to be allowed?

The amount of state activity justified by my arguments is problematic in itself. The analysis I have presented identifies a conflict within the libertarian structure. It is a conflict between positive and negative rights; one that requires government action as the solution. A second project would be to set out the exact size of the "more-than-minimal state".

However, describing what this state would look like is a project of its own. It requires very extensive analysis. My project has been to point out the need, within the libertarian framework, for this further analysis. Resolving the conflict I have discussed does not entail rejecting the entire libertarian position. It does, however, call for fundamental changes within that structure.

FOOTNOTES FOR CONCLUSION AND GENERAL REMARKS

1. In passing, Nozick makes reference to Milton Friedman's "school vouchers" (Nozick, p.26). Although Nozick states that Friedman's voucher system is "clearly redistributive", one might be tempted to interpret Friedman as positing an alternative to my Chapter I. However, Friedman states that edcuation must be assured for all citizens. (Milton Friedman, Capitalism and Freedom, p.86. The University of Chicago Press, 1962.) Thus, Friedman and I agree on this basic issue.

   The use of vouchers is Friedman's way of diversifying the availability of education. Friedman claims:

   > Governments could require a minimum level of school financed by giving parents vouchers redeemable for a specified maximum sum per child per year if spent on "approved" educational services. (Friedman, p.89.)

   Thus the actual operation of schools could be in a competative market system. Each school would compete to attract students. However, the above passage specifies the need for a minimal level of education, and an approved service. It is the governments job to set this minimal standard. It is also the governments job to determine what an "approved" institution is, and to regularly inspect these institutions to assure proper standards.

   Friedman does present a particular form the educational system may take. However, the elements involving government action are embedded in Friedman's system. This system, although attempting to keep government intervention to a minimum, still requires a more-than-minimal state.

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